

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

ORIGINAL

In the Matter of)

WKZF-FM, Inc.)

FCC File No. BRH-950814UC

MM Docket No. 96-110

For Renewal of License)

for Station WKZF(FM))

Bayboro, North Carolina)

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NOV 20 1996

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

PETITION FOR EXTRAORDINARY RELIEF

Pursuant to Section 1.276(f) of the Commission's rules,¹ WKZF-FM, Inc. ("WKZF-FM"), licensee of Station WKZF(FM), Bayboro, North Carolina ("WKZF" or the "Station"), through its attorneys, hereby submits this Petition for Special Relief in the above-referenced proceeding regarding the renewal of the license for the Station and expedited processing of its pending application for Modification of WKZF. In support thereof, the following is shown:

A. BACKGROUND

After acquiring the Station on February 20, 1995 from the creditors of a bankrupt former licensee who had let the Station remain dark since July 24, 1993, WKZF-FM sought approval from the Commission to implement an engineering facility upgrade that would allow the Station to resume broadcasting as expeditiously as possible from a new tower site, given the inoperable condition of the Station's former tower. The Commission granted such approval and modified

¹ 47 C.F.R. § 1.276(f).

Noted by Clerk
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the conditioned assignment to require the Station to return to the air by November 20, 1995.² On August 14, 1995, WKZF-FM filed its renewal application for the Station, in which it noted that the Station was still off the air and that the licensee was in the process of developing engineering to implement the upgrade for the Station.

Due to temporary delays in implementing the engineering upgrade created by the need to finalize evaluation of a directional antenna deployment, the Station did not return to the air by November 20, 1995. However, because the licensee had notified the Commission through Exhibit 2 of its renewal application that it essentially would remain off the air until the engineering upgrade was implemented, WKZF-FM, who was not represented by an attorney at the time, was not aware that separate notification to the FCC was required. Nevertheless, the fact that the licensee disclosed the Station's dark status on its renewal application indicates that there was never any intent to deceive the Commission with regard to whether or not the Station was on the air. Yet despite WKZF-FM's demonstrated ongoing good faith efforts to resume broadcasting, on May 9, 1996, the Mass Media Bureau ("Bureau") designated for hearing the application of WKZF-FM for renewal of the license for the Station.³

On August 27, 1996, WKZF-FM filed an application with the Bureau for approval to implement the engineering upgrade for the Station in order to return service to the Bayboro community. Subsequently, on August 28, 1996, WKZF-FM filed a Motion for Summary Decision in an effort to expedite processing of its renewal and upgrade applications in light of the

Letter to WKZF-FM, Inc. (Ref. 1800B3-GDG), dated July 25, 1995.

Hearing Designation Order, DA 96-96-724, released May 9, 1996 ("HDO").

statutory deadline set by the Telecommunications Act of 1996 that the licenses for all broadcast stations that have been dark for 12 months or more will automatically expire on February 8, 1997 if the stations have not resumed broadcast operations by that date. The Bureau filed its Opposition to the Motion for Summary Decision and Countermotion for Summary Decision on September 5, 1996. A Reply thereto was filed by WKZF-FM on September 13, 1996, and the Bureau's Motion to Dismiss the Reply was filed September 17, 1996.

Through the detailed facts set forth in its earlier pleadings in this proceeding,⁴ WKZF-FM has shown that it has acted diligently and in good faith to return the Station to the air since it acquired the license in the spring of 1995. When it acquired the license, the former tower site was inoperable and not in the condition to be repaired and the Station had been dark for some time. WKZF-FM has since arranged for operation of the Station from a new site and has obtained the technical and financial support necessary to return the Station to the air within 60 days. Yet despite this showing, in a Summary Decision released September 24, 1996, Administrative Law Judge John M. Frysiak denied WKZF-FM's Motion for Summary Decision and granted the Bureau's Countermotion.⁵ Under the Summary Decision, the renewal application for WKZF was denied and the station's license was canceled. However, the pending application to upgrade the facilities of WKZF was not dismissed in that decision and has not been dismissed to date. On September 27, 1996, public notice of the Summary Decision was given in Report No. 43835 of the Commission's daily releases.

Copies of these pleadings are attached as Exhibit A.

A copy of the Summary Decision is attached as Exhibit B.

B. ARGUMENT

Under the Commission's rules, WKZF-FM had the procedural option of filing exceptions to the Summary Decision within 30 days of the release date of that decision, or by October 24, 1996. Furthermore, the Commission had the option of reviewing the decision on its own motion until November 13, 1996. WKZF-FM heavily weighed its option to file exceptions to the Summary Decision but ultimately decided that it was not a prudent business decision for the small business licensee to invest further financial resources to further appeal the case in light of the impending statutory deadline to return the Station to the air.⁶ This decision was also taken on the basis of indications received informally from the Bureau and Commission staff that the ultimate decision on appeal would not be able to be processed in enough time to enable the Station to meet that February deadline. The Commission has not chosen to review the decision on its own motion to date.

Section 1.276(f) of the Commission's rules provides that when a party "fails to file exceptions within the specified time to an initial decision which proposes to deny its application, such party shall be deemed to have no interest in further prosecution of its application, and its

As a small business attempting to serve a small rural community, WKZF(FM) is particularly deserving of the Commission's most favorable consideration. Section 277 of the Telecommunications Act of 1996 as well as the Small Business Growth and Fairness Act of 1996, Public Law 104-121, clearly direct the Commission to pay attention to and affirmatively to help small business and not to erect barriers to their growth and development. Further, the Commission now is engaged in a proceeding in an effort to foster small business participation in the Telecommunication Industry through its Notice of Inquiry in GN Docket No. 96-113. (FCC No. 96-216; adopted May 10, 1996; Released May 21, 1996).

application *may* be dismissed for failure to prosecute.”⁷ However, the Commission has held that the permissive nature of this rule on its face be interpreted narrowly to allow further interest in a dismissed application where the time for filing exceptions and Commission review has passed only under “extraordinary circumstances.”⁸ Because the circumstances in the instant case are both novel and extraordinary, particularly due to the urgency presented by the recently imposed statutory deadline as specified in the Telecommunications Act of 1996, the Commission should review Judge Frysiaak’s Summary Decision despite the fact that WKZF-FM did not file exceptions to it.

Just five days ago, in Southwestern Broadcasting Corporation, MM Docket No. 96-104, File No. BRH-900315UC, FCC 96-443, released November 15, 1996, the Commission reversed the Summary Decision of Administrative Law Judge Richard L. Sippel (“ALJ”) which had denied Southwestern’s renewal application and canceled the license for Station KLZK(FM), Brownfield, Texas.⁹ KLZK has been off the air for several years and, like WKZF-FM, filed its application to modify the station’s facilities after an HDO was issued to consider the same issues which were presented in the HDO in the instant case. In both cases, the Bureau has maintained the position that it will not expedite processing on pending modification applications where the underlying station license renewal is subject to review under an HDO. The Bureau has disregarded the statutory deadline of February 8, 1997 in enforcing this illogical policy. As

47 C.F.R. § 1.276(f) (emphasis added).

See Frank K. Spain, 77 RR2d 12, 13 (1995).

Attached as Exhibit C.

applied to the instant proceeding, the Bureau's refusal to process the licensee's pending modification application because consideration of the Station's renewal application was designated for hearing has made it impossible for WKZF-FM to obtain the authority necessary to return the Station to the air, and thus, its renewal application was denied and its license canceled.

In Southwestern, the Commission has stated that failure to take steps toward resumption of service *before* issuance of the HDO is not fatal to the application.¹⁰ The Commission further notes in that decision that, with respect to the Bureau's stated policy to assist stations facing the statutory deadline by expeditiously acting on applications that are required to return a station to the air, the Bureau never indicated an exception to that policy for actions taken after designation for hearing.¹¹ Because Southwestern had made diligent efforts to acquire financial and technical means to return the station to the air, the Commission ordered the Bureau to reinstate and process Southwestern's modification application on an expedited basis, and if the application is technically complete and otherwise grantable, issue a construction permit by December 6, 1996 to allow sufficient time for Southwestern to construct and resume operations prior to the statutory deadline.¹² Action on the renewal application and the exceptions filed by Southwestern is to be held in abeyance pending further order of the Commission.

Southwestern at 2.

Id. The Bureau's policy is stated in Procedures Announced for Expedited Processing of Applications Filed by Silent Broadcasting Stations (Public Notice), DA 96-818, released May 22, 1996.

Id.

In all fairness, WKZF-FM asks for nothing more than the Commission has granted Southwestern. As in Southwestern, WKZF-FM has diligently acquired both the financial and technical capabilities to return the Station to the air and thus should have been allowed to do so before Judge Frysiak decided purely on the basis of a minor procedural mistake by WKZF-FM that it was impossible to return the Station to the air by February and thus subsequently denied WKZF's renewal application and canceled the Station's license.¹³ WKZF-FM was trapped in a no-win situation where neither the Bureau nor Judge Frysiak would grant the respective application under consideration without the grant of the other application by the other party. In light of the Commission's recent decision in Southwestern, WKZF-FM urges the Commission to reverse Judge Frysiak's decision, reinstate the Station's license, and order the Bureau to expeditiously consider the modification application. As in Southwestern, if the application is technically complete and otherwise grantable, the Bureau should grant it and allow the issues considered in the renewal proceeding to be considered after the Station is returned to the air. If WKZF-FM does not return the Station to the air by the statutory deadline, the license will expire automatically and the Commission would have no further action to take with regard to this proceeding except to terminate it. Thus, the Commission has nothing to lose and the community

WKZF(FM) notes that in two factually similar cases, the simple administrative mistake of the licensee in not filing a request for an additional period in which to remain silent was not dispositive or fatal to the license renewal application. See: In the Matter of WPVG, Inc. for Renewal of License for Station WPVG(AM) Funkstown, Maryland; FCC 96D-05; (Issued: September 3, 1996; Released: September 5, 1996); In the Matter of Hometown Media, Inc. for Renewal of License for Station WAYB(AM) Waynesboro, Virginia; FCC 96D-06; (Issued: September 13, 1996; Released September 17, 1996).

of Bayboro, North Carolina has everything to gain by a Commission grant of this request which would allow the license to offer a first load service to the community.

The critical issue in this proceeding has been and remains whether grant of the renewal application (or now, reinstatement of the license) serves the public interest. The public interest of the Bayboro, North Carolina community is surely not best served by the cancellation of the Station's license. Such cancellation, if allowed to stand, will assure that the Bayboro community will lose much-needed local radio broadcast service for years to come, if not permanently. The alternative, to reinstate the license, will allow the licensee the opportunity to return the Station to the air and effectively serve the Bayboro public. Thus, WKZF-FM urges the Commission to reinstate the Station's license and order the Bureau to expeditiously process the pending upgrade application, in the interest of the public and the community of Bayboro.

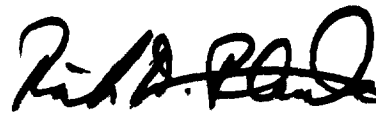
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D. CONCLUSION

For the reasons set forth above, WKZF-FM respectfully requests that the Commission reinstate the license for WKZF and instruct the Bureau to promptly consider and grant WKZF-FM's pending modification application on an expedited basis and in no event later than December 6, 1996.

Respectfully submitted,

WKZF-FM, INC.

By: 
Rick D. Rhodes


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(Licensed in Georgia Only)

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November 20, 1996

CERTIFICATE OF SERVICE

I, Tracy L. Trynock, do hereby certify that I have, this 20th day of November, 1996, caused to be sent by hand delivery copies of the foregoing "Petition for Extraordinary Relief" of WKZF(FM), Inc. to the following:

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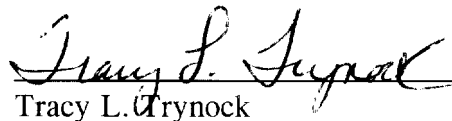

Tracy L. Crynock

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILE COPY

In the Matter of)

WKZF-FM, Inc.)

For Renewal of License)
for Station WKZF(FM))
Bayboro, North Carolina)

FCC File No. BRH-950814UC
MM Docket No. 96-110

RECEIVED

AUG 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Honorable John M. Frysiak, Administrative Law Judge

MOTION FOR SUMMARY DECISION

WKZF-FM, INC.

By: Rick D. Rhodes
Elizabeth A. Sims

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August 28, 1996

Table of Contents

Summary of Argument	iii
I. FACTS	1
II. ARGUMENT	5
A. <u>Because the Licensee Has Made Diligent Efforts to Return the Station to the Air, the License Should Be Expeditiously Renewed.</u>	5
B. <u>A Decision to Renew the Station's License Would Be Directly in Line with Sound Commission Precedent and in the Public Interest.</u>	6
C. <u>Because Time Is of the Extreme Essence, WKZF Cannot Wait until after Its Designated Hearing Date in October for the Commission to Decide Its Case.</u>	8
D. <u>Because the Issues Which Have Been Designated for Hearing Have Been Addressed Herein, Postponing a Decision in the Instant Proceeding Is Unnecessary.</u>	12
III. CONCLUSION	15

Summary of Argument

The license for Station WKZF(FM), Bayboro, North Carolina, should be expeditiously renewed by summary decision in this proceeding. WKZF-FM, Inc., the licensee for the Station, has made good faith, diligent and measurable efforts to resume expeditiously on-air operations in Bayboro since it was assigned the license for the Station. As explained further herein, a decision to renew the WKZF(FM) license is consistent with Commission precedent and would best serve the interests of the people of Bayboro and Pamlico County. Moreover, because the Telecommunications Act of 1996 mandates that a license for a broadcast station that remains silent for more than twelve months automatically expires at the end of that period (or February 8, 1997, if such station was silent before the Act went into effect), there is no time to wait for the scheduled hearing in October to consider whether the license should be renewed in ordinary due course. Unless a summary decision is forthcoming, there will likely be insufficient time to prosecute and implement the licensee's pending facilities upgrade application that is necessary to return the Station to the air, and thus, the provision of service to the people of the Bayboro, North Carolina area will be further postponed, if not permanently discontinued. Because the licensee has been diligent in its efforts to return the Station to operation, and because avoidable loss of service was surely not the ultimate intent of Congress when the Telecommunications Act of 1996 was passed, the license for WKZF(FM) should be expeditiously granted in order to allow the Station to resume operations and serve the public of Bayboro.

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WKZF-FM, Inc.)	FCC File No. BRH-950814UC
)	MM Docket No. 96-110
For Renewal of License)	
for Station WKZF(FM))	
Bayboro, North Carolina)	

To: The Honorable John M. Frysiak, Administrative Law Judge

MOTION FOR SUMMARY DECISION

Pursuant to Section 1.251 of the Commission's rules,¹ WKZF-FM, Inc. ("WKZF-FM"), licensee of Station WKZF(FM), Bayboro, North Carolina ("WKZF" or the "Station"), through its attorneys, hereby submits this Motion for Summary Decision in the above-referenced proceeding regarding the renewal of the license for the Station. In support thereof, the following is shown:

I. FACTS

The undisputed factual background of this proceeding demonstrates that WKZF-FM has made extensive efforts to return the Station to the air. WKZF has been off the air since mid-1993, when a previous licensee, Carolina Community Broadcasting, Inc. ("Carolina"), suspended operations for financial reasons. In a series of attempts to resume operation and return broadcast service to the Bayboro area, the Station was assigned to Sunbelt Media, Inc. ("Sunbelt") in

¹ 47 C.F.R. § 1.251.

November 1993 (FCC File No. BALH-930907GE), and the transaction was consummated by the parties on December 13, 1993.

Subsequently, as a result of its own financial difficulties, Sunbelt was also unable to return the Station to the air and thus assigned the license to WKZF-FM, the current licensee (FCC File No. BALH-940826GN), in the fall of 1994. The Commission granted the assignment to WKZF-FM in December 1994 and directed the new licensee to return the Station to the air within sixty days of consummation of the assignment.

WKZF-FM notified the Commission on March 20, 1995, that the assignment had been consummated on February 20, 1995, and requested authority to modify the condition imposed on the assignment to facilitate an engineering facility upgrade. The Commission consented to the request for time to seek authority for and execute an upgrade of the Station's facilities and required the licensee to return the Station to the air within 240 days of the date of consummation of the assignment (*i.e.* November 20, 1995).²

WKZF-FM filed the renewal application at issue herein on August 14, 1995, in which it reported in Section III, Item 3 that the Station remained off the air. WKZF-FM emphasized in an exhibit to that application that it was currently developing the engineering for the Station to apply for an upgrade to a Class C3 facility. This renewal application was filed less than three weeks after the Commission notified WKZF-FM in a letter dated July 25, 1996, that it could

² Letter to WKZF-FM, Inc. (Ref. 1800B3-GDG), dated July 25, 1995.

pursue the upgrade, clearly not enough time to have completed the work and returned the Station to the air.³

In June 1995, prior to the preparation of the renewal application, WKZF-FM engaged the services of professional engineering consultant Timothy L. Warner of Asheville, North Carolina. Mr. Warner was directed at that time to perform the technical work that would accompany the Station's upgrade application to the Commission. He first reviewed the Station's upgrade options on September 26, 1995. At that time, he proposed an engineering study to determine whether a directional antenna permitted under Section 73.315 of the Commission's rules would allow the Station to move to an existing tower near Arapahoe, North Carolina, in an effort to save both time and money in getting the station back on the air, due to the concerns discussed *supra* at note 3. As noted therein, the proposed new location also allows WKZF to serve a larger segment of the public.

On September 28, 1995, Mr. Warner sent a preliminary pattern proposal to Electronics Research, Inc. ("ERI") for its review. In October 1995, ERI responded with an antenna development proposal which solicited specific site information, including a survey of the existing

³ It is important to note that the Station's former tower site was considered unsafe due to extensive deterioration of the tower prior to WKZF-FM's acquisition of the license. In fact, due to the safety threat and for related insurance purposes, the new licensee, who did not own the site, was not even allowed to inspect the former tower site upon receiving the license, even after repeated attempts to conduct a site review to determine whether repair of the tower site was feasible. WKZF-FM thus estimated at the time that it would take almost as much time, if not more, to return the Station to the air using the old site, due to zoning and reconstruction activity, assuming authorization was eventually received to enter the site premises, as it would to obtain authorization from the Commission to implement an upgrade to the Station's facilities at the currently proposed site. Moreover, using the proposed site allows the Station to serve a larger segment of the Bayboro community, and thus, was considered the better option.

Arapahoe tower site, to confirm the orientation of the tower. After lengthy discussions with Mr. Warner regarding the specific requirements needed by WKZF, Dennis Fornes, RLS, who was commissioned to provide the tower orientation, provided such data to ERI on January 12, 1996.

Mr. Warner also contacted the structural engineers at ERI to determine the strength of the existing Arapahoe tower. They collectively have determined that the only modifications that need to be made are the replacement of the guy wires immediately above the proposed directional antenna with non-conducting fiberglass rods connected to new guy wires. ERI then submitted an estimate for the costs of the tower work.

As the engineering work was being processed and analyzed, WKZF-FM was still ascertaining whether to invest its resources to reconstruct the former, dismantled site, to which it had repeatedly been denied access, or alternatively, to start anew from a different site. Accordingly, the work proposed by Mr. Warner and the ERI engineers was temporarily postponed. However, prior to the Commission's designation of the Station's renewal application for hearing, WKZF-FM, working in conjunction with its engineering consultants, completed the technical work and analysis of the proposed site which was needed to implement the upgrade of the Station and WKZF-FM is prepared to move forward with construction. An application for authority to make the proposed changes has been filed with the Commission.⁴ According to delivery and installation time estimates given by technical consultants and equipment manufacturers selected by the licensee to provide equipment and substantially implement the

⁴ The modification application was filed with the Commission on August 27, 1996. A copy of the application is attached hereto as Exhibit 1.

upgrade and necessary site construction activity, WKZF-FM is prepared to have the Station back on the air within 60-90 days of the Commission's grant of its pending modification application.

II. ARGUMENT

A. Because the Licensee Has Made Diligent Efforts to Return the Station to the Air, the License Should Be Expeditionally Renewed.

It is evident by WKZF-FM's efforts as described above that the licensee is committed to returning broadcast service to the public as soon as practically possible. At this moment, the licensee has the requisite financing and technical capability to put the Station back on the air and serve a substantially greater segment of the population around Bayboro, North Carolina, the Station's community of license, than the Station has ever served before. However, it can do nothing further until the Commission acts to renew its authorization and grants its pending modification application authorizing it to go forward with the upgrade facilities construction.

WKZF-FM recognizes the Commission's obligation to reclaim licenses for stations that are off the air for a prolonged period of time and are thus not serving the communities they are licensed to serve. However, because it is willing and able to return the Station to the air within 60-90 days of the Commission's grant of its renewal application and grant of authority to construct modified facilities, it would in actuality be *contrary* to the public interest to take away WKZF's license at this point. As a result of such an action, service to the Bayboro area would be postponed even further as the lengthy administrative process of granting the license to another entity was undertaken; in fact, it is a distinct possibility that no license for a station to serve Bayboro would ever be issued should no new parties interested in applying for the license come forward.

Furthermore, the current licensee should not be held responsible for the actions (or failure to act, as the case may be) of former licensees over which it had no control. WKZF-FM took over the Station essentially from creditors of the former licensee who may have had no intention or capability of returning the Station to the air, but instead understandably wanted to sell it to reclaim as much of their original investment in the Station as possible. It has always been and continues to be WKZF-FM's intention to return the Station to air, as evidenced by its efforts and considerable expenditures described above. For this reason, and in the public interest, the Commission should grant WKZF's renewal application in an expeditious manner.

B. A Decision to Renew the Station's License Would Be Directly in Line with Sound Commission Precedent and in the Public Interest.

Historically, the Commission has rightfully empathized with licensees of silent stations who have made significant efforts to return their stations to the air.⁵ The basis for these decisions has predominantly been that the public interest is best served by expeditiously returning service to the people in and surrounding the station's designated community of license. While done in the *name* of the public interest, as stated above, once the license is taken from the existing licensee and the station goes dark, or alternatively, once the station goes through the administrative process of reapplication by the current licensee and the subsequent hearings that would ensue, the public interest is actually thwarted in favor of rigid adherence to an inflexible

⁵ See *Video Marketing Network, Inc., et al.*, 10 FCC Rcd 7611, 7613 (1995) (no hearing on licensee qualifications required where licensee had been forthright about past violations, intentional and unintentional, and had acted affirmatively to correct deficiencies); *Keyboard Broadcasting Communication*, 10 FCC Rcd 4489, 4490 (1995); *Cavan Communications*, 10 FCC Rcd 2873, 2876 (1995); *WINT-TV, Inc.*, 1986 FCC Lexis 4007 (1986); *Wasque Corp.*, 41 RR2d 419, 420 (1977).

policy. Where the existing licensee is willing and able to take actions to restore service, as in the instant case, license cancellation is clearly contrary to the underlying purpose of that policy, which is to serve the public interest by ensuring the license is held by a licensee who will return the station to the air and serve the community of license.

Moreover, where innocent creditors are involved, the Commission has held that a potential indirect benefit received by a possible wrongdoer who is a licensee of a station is substantially outweighed by the substantial equities in favor of the innocent creditors and the public interest in resumption of service.⁶ As in *Second Thursday*, it would be grossly unfair to cause WKZF-FM's innocent creditors⁷ to be penalized and lose their entire investment in the Station as a result of the excusable negligence of the previous licensees who did not take aggressive steps. As illustrated above, WKZF-FM has always intended in good faith and has exercised considerable diligence in efforts to return the Station to the air. Its failure to do so by November 20, 1995, the date by which the Station was originally directed to resume operations, was unavoidable due to the nature of the technical modifications that need to be made to get the Station back on the air and improve service coverage. However, even if the Commission finds some fault with regard to WKZF-FM's past actions, *Second Thursday* confirms that its innocent creditors should not be forced to lose their entire investment in the Station as a result.

⁶ *Second Thursday Corp., et al., Memorandum Opinion and Order*, 19 RR2d 1199, 1200 (1970).

⁷ WKZF-FM's creditors are Edward Bolding, in his individual capacity, and The Connelly Company.

WKZF-FM acknowledges its mistake in not separately notifying the Commission that the Station was not going to return to the air in time for the November 20, 1995 deadline.⁸ However, the licensee was not represented by an attorney at that time and was mistakenly under the impression that its explicit admission on its renewal application that the Station was not on the air and that it intended to file a facilities change application with the Commission in order to resume broadcast operations was sufficient notice. Certainly, WKZF-FM's admissions in the Station's renewal application demonstrate that the licensee was attempting to keep the FCC fully informed on current developments.

C. **Because Time Is of the Extreme Essence, WKZF Cannot Wait Until After Its Designated Hearing Date in October for the Commission to Decide Its Case.**

Section 312(g) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "1996 Act"), states that the licenses of all broadcast stations that are silent for twelve consecutive months will be automatically terminated at the end of that period.⁹ Under the language of the 1996 Act, it appears that the Commission has no discretion to grant extra time to any licensee, regardless of the circumstances surrounding a request for such an extension. Where the station was off the air prior to the implementation of

⁸ Section 73.1940(a)(4) of the Commission's rules, 47 U.S.C. § 73.1940(a)(4), requires a licensee to notify the Commission if a station is going to discontinue operations for more than 30 days and seek temporary authority for the Station to remain silent. Additionally, Section 73.1750 requires a licensee to notify the FCC of permanent discontinuance of station operation and to forward the license and other authorizations for the station to the Commission for cancellation. 47 U.S.C. § 73.1750. While WKZF-FM admits its inexperience in not properly notifying the Commission under Section 73.1940(a)(4), it has at no time intended to permanently discontinue operation of the Station, and thus is not in violation of Section 73.1750.

⁹ 47 U.S.C. § 312(g).

the 1996 Act, the twelve month period begins to run from February 8, 1996, the date on which the 1996 Act was signed into law.¹⁰ Neither a Station's existing authorizations nor its pending applications will toll or extend the twelve month period that triggers expiration. As shown in the facts set forth above, WKZF was off the air well before the enactment of the 1996 Act. Therefore, if WKZF is not back on the air by February 8, 1997, the license for the Station will automatically expire.

In its Public Notice of May 22, 1996, the Mass Media Bureau expressed its recognition, in light of Section 312(g), of the need for expedient action on pending applications that are necessary to return a silent station to the air and established certain procedures to ensure such expedited processing.¹¹ These procedures, *inter alia*, included using the phrase "REQUEST TO EXPEDITE APPLICATION OF SILENT STATION" in a Station's transmittal letter submitted with such an application, along with the date on which the license will expire if it remains off the air.¹² As a result of this Public Notice, WKZF expected that its application for major change in the facilities of the Station would be processed expeditiously when it was filed.

¹⁰ See FCC Public Notice, DA 96-818, released May 22, 1996 (citing *Order, Silent Station Authorizations*, FCC No. 96-218 (released May 17, 1996)) (Attached as Exhibit 2).

¹¹ Id.

¹² Id.

However, in an *Order* released July 1, 1996,¹³ and a subsequently issued *Memorandum of Law and Policy* issued by the Mass Media Bureau two days later,¹⁴ the accommodating position of the Mass Media Bureau as stated in its Public Notice of May 22, 1996, *supra* at n. 7, was essentially retracted.¹⁵ In *Southwestern*, the renewal application for Station KLZK(FM), Brownfield, Texas, was designated for hearing as a result of the station's silent status. The Administrative Law Judge in that case, The Honorable Richard L. Sippel, stated that "there seems to be a tension if not a contradiction in the two policies."¹⁶ He also directed the Mass Media Bureau to clarify the rationale behind a policy of different processing procedures for an application for modification filed by a licensee whose silent status has caused its renewal application to be designated for hearing from a similar application filed by a licensee whose renewal application has not been designated for hearing, especially in light of the "universally acknowledged main issue which is the most expeditious resumption of services."¹⁷ Judge Sippel

¹³ *In the Matter of Southwestern Broadcasting Corporation, Order*, MM Docket No. 96-104, FCC 96M-168, File No. BRH-900315UC (rel. July 1, 1996) ("*Southwestern*") (Attached as Exhibit 3), decided by *Summary Decision*, FCC 96D-04, released July 29, 1996 ("*Southwestern Summary Decision*") (Attached as Exhibit 4).

¹⁴ Attached as Exhibit 5.

¹⁵ Because the Mass Media Bureau contradicted a former Public Notice with a subsequent individual case decision, other licensees of dark stations did not have proper notice of the policy change. Moreover, the radical break in previous form was not only a refusal to *expedite* the processing of these applications at the Bureau level, it was an outright *refusal to act* on them until the renewal of the underlying application had been granted. Such a radical change in policy without adequate general notice to those who might be affected by the individual decision places an impossible burden on licensees of dark stations to somehow discover and appropriately react to the extreme policy change.

¹⁶ *Id.* at 1-2.

¹⁷ *Id.* at 2-3.